IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Cause No. CV-11-26-BU-SEH

Robert Van Orden,

Plaintiff,

vs.

Benefis Healthcare,

Defendant.

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TRANSCRIPT OF PROCEEDINGS

MOTION HEARING

Missouri River Federal Courthouse
U.S. District Court Great Falls
125 Central Avenue West
Great Falls, MT 59404

November 13, 2012
10:00 a.m.

The Honorable Sam E. Haddon, Presiding

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PROCEEDINGS

(The proceedings began at 9:58 a.m.)

THE BAILIFF: All rise.

THE COURT: Good morning, everyone. Be seated, please. Madam clerk, if you'd call our matter for us, please.

CLERK OF COURT: This Court will now conduct a motion hearing in Cause No. CV-11-26-GF-SEH, Robert Van Orden versus Benefis Healthcare.

THE COURT: The Plaintiff is represented in this matter by Mr. Lanning, the Defendant is represented by Mr. McClain and others.

We have before the Court the Plaintiff's motion for class certification. The Defendant has, of course, filed briefs in opposition. And, Counsel, I very much appreciate your accommodation on the adjustment of your schedules to have the hearing at this time. We were uncertain when we last talked as to whether we could hold with the ten o'clock hour, but as it turns out the criminal matter took care of itself through the Defendant's change of plea and we are ready to proceed.

Mr. Lanning, you have the floor.

MR. LANNING: Thank you, Your Honor. We represent Robert Van Orden, Your Honor, and we have moved

for class certification in this case. It is my intent, subject to specific questions from the Court, to keep my presentation relatively short today. I believe that all of the various elements that I am required to prove were discussed in length in the party's briefs, and, therefore, I will just address a few brief issues and --

THE COURT: Take as much time as you wish, Counsel. We haven't placed any time limits on anyone here today.

MR. LANNING: I do understand that. And thank you, Your Honor. It must be nice from your end to have your week open up.

THE COURT: Well, someone else said the Lord made lots of time, we'll take all we need. Go ahead, Counsel.

MR. LANNING: Thank you. The situation in this case, Your Honor, involves one which is particularly suited to class action resolution. Benefis has engaged in a policy and practice -- it appears from their affidavit that it's an unwritten policy and practice -- of arranging the way that it bills TRICARE beneficiaries to maximize its recovery where there is a third-party insurance policy available, and, in fairness to Benefis, it appears that they have done so with the knowledge and approval of the local TRICARE regional administrator. As the Court is aware, there are three regional TRICARE

administrators nationwide, each one enters into contracts with healthcare providers in its area, and such a contract was entered into here between the regional administrator and Benefis.

Federal law generally provides that TRICARE, which is a health program under which active duty military and some others, including inactive duty military and family members, are entitled -- well, are entitled to healthcare, and it's paid by TRICARE on behalf of the Government. TRICARE has many, many complex regulations, but an important element of TRICARE, and constant with its purpose of providing medical care and protecting the service members and others who are qualified, is that healthcare organizations which provide services may not recover directly from the TRICARE beneficiary, which would be the military member or his family and so on.

What Benefis has done in its practice is this: Where it identifies one of its patients as having TRICARE, it then looks to other sources of insurance. And we often see those in cases of accidents, liability insurance, uninsured and under-insured motorist coverages, as well as Med Pay provisions. Where Benefis identifies that those insurance sources are available, it does not bill TRICARE, because under TRICARE it would be forced almost certainly in every case to take much less than the full amount of its bill. TRICARE pays

discounted amounts, and those discounted amounts are all that the healthcare provider is entitled to recover.

The regional contract and the TRICARE manual, which is not a regulation and doesn't have the force of law, suggests that it is acceptable for Benefis to go ahead and seek these third-party payments from insurers in full as long as it hasn't billed TRICARE yet. And that's what Benefis has been doing. It is our contention that that is inappropriate, that Federal law does not allow that. That if a person is covered by TRICARE, regardless of the circumstances of insurance, what Benefis has to do is submit it to TRICARE and take the money from TRICARE, and that's all. And we believe that the Georgia Supreme Court was right in the MCG case when it determined that it is the Government who has the ability to obtain reimbursement from third parties, but the amount of that reimbursement is limited to the amount that TRICARE has paid out to healthcare providers.

There are -- there is another way in which Benefis has manifested its attempt in this difficult economy to maximum its payments from TRICARE beneficiaries, and that is it will on occasion bill TRICARE, and then it will learn after billing TRICARE, and indeed sometimes after payment of TRICARE, that there is a third-party insurance source available. What it will do then is bill the third party insurance source for the full amount of its bill; and if it recovers it, then

it will go ahead and reimburse TRICARE for its discounted payment. Again, it is our position in this suit that that is absolutely a violation of Federal law.

My client, Robert Van Orden, straddles both of those situations. He was injured in an automobile accident, and he sought immediate treatment. When he sought immediate treatment, and this was in October of 2009, he identified that he had been hit by someone else, and he identified the tortfeasor's insurance company. As a result, that insurance company was billed and TRICARE was not.

Some months later, about eight, nine months later he returned to Benefis for additional treatment. At that time he was asked, Has your insurance remained the same? And he said, Yes. And based on that, the hospital billed TRICARE and was paid by TRICARE. And, ultimately, then, they put two and two together, realized that there was a third-party claim here, and they filed a lien for this new treatment against Unitrin, that third-party insurer, and then were prepared to pay TRICARE back if they recovered that money. Ultimately, due to our involvement, they withdrew their lien.

Our request for class certification is based on the fact that our client is not the only one to whom this has happened, that this represents a policy and procedure that Benefis applies in these cases. And, in fact, Your Honor, if you've reviewed their brief, you see that they make no bones

about that, that is the case. They will say that they believe they are acting under a correct interpretation of Federal law and under permission from the regional administrator.

But if you turn to their brief on Pages 7, 8 and 9, essentially they admit that that -- what I just described are the procedures that they follow. And that's an important admission, because how this case is going to be decided, both as an individual case and if certified as a class action, requires the simple resolution of that legal question. In other words, are they permitted under Federal law to bill third-party payers first and not bill TRICARE? Are they permitted to pay TRICARE back if they find others?

In other words, the simple question is may they effectively maneuver themselves out of receiving a lower TRICARE payment where they have identified a third-party payer? We believe the answer is no. They believe the answer is yes. The reason that's significant is because that is a legal question. We are not going to have substantial factual questions on the liability issue, and its capable of an easy resolution based simply upon briefing.

The other reason that it's important, and that specifically relates to the certification issue, Your Honor, is that they have described a policy. It's unwritten, but nevertheless it is a systematic, programmatic method that this hospital has devised for dealing with TRICARE beneficiaries

when there is other third-party insurance available. They follow the same rule with respect to everyone. The only difference is whether they find out about the other insurance before they bill TRICARE, or after.

As I said at the beginning, I'm not going to go through, unless the Court desires it, every single of the various elements required to prove that we are entitled to certification under Rule 23, I think we address each of them in our brief. I just want to touch upon a few particularly contested areas. One of those, Your Honor, is commonality. The issue is whether their claims or defense is common to each class. As the Court is aware, the seminal United States Supreme Court case addressing this issue is the Walmart case.

In the Walmart case, it was alleged that Walmart had systematically discriminated against female employees across the board. In that case, however, ultimately the United States Supreme Court refused to grant certification, and one of the sticking points was commonality. In that case, the Supreme Court noted that there was no specific identifiable policy or program which led to discrimination against women in the Walmart corporation.

Further, the Court noted that not only was there not a policy, but the policies that existed gave substantial discretion in hiring and advancement decisions to local and regional managers. So the court said that regardless of

whether the plaintiffs could demonstrate that company wide women failed to advance, it was not a suitable action for a class action on the grounds that there was not a common basis of law, or question, you know, because of the variations, because there was no company-wide policy. Basically every claim was a separate and discreet claim.

That's not the case here, however. As indicated by Benefis' own brief, what they are doing is uniform, systematic, and has the effect of policy, even if it's not specifically written. They treat all of these cases the same. They do the same thing with respect to every TRICARE beneficiary who comes in, and that's determine whether or not there are other sources of insurance; and if there are, pursue them first or to the exclusion of TRICARE so that they can maximize their recovery. There would be no problem with that, except, as we believe, it violates Federal law and -- both statutory and regulatory.

But the difference between Walmart and this case, what makes this case more like the Diaz case, more like the Montana cases I've cited, are simply that, that what we have in this case is a programmatic policy. And whether or not that was -- is a correct policy, or that policy violates Federal law, is a sufficient question to satisfy commonality. It is just that simple. Ordinarily I would not necessarily cite a whole lot of Montana Supreme Court decisions to this Court, but they are

consistent, and, in fact, the Montana Supreme Court works hard to apply Federal law, even when it does its own analysis under class actions.

And here -- and I apologize, I'm not sure if the Court has a copy of it. I certainly have not provided one. But I would refer to the recent case of Chipman versus Northwest Healthcare Corporation, 2012 WL 5328634. This is a Montana Supreme Court case which was decided on October 30th, 2012. And I think it's worth mentioning, because it applies Walmart in a case which -- while not necessarily similar to this one, has similar analytical framework.

Chipman involves a case where hospital employees brought suit against a hospital seeking a declaration that the sick leave buy-back program was part of their employment contract to which they were entitled after the hospital and its related entities stopped, just unilaterally said we are stopping that buy-back program. And there was a request for class certification. And commonality was one of the big issues there, and the Montana Supreme Court applied a strictly Federal analysis, looking closely at the Walmart case and said this: "Class member's claim must depend upon a common contention that is capable of class wide resolution," which means, quoting Walmart, that "Determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."

Your Honor, that's exactly the situation here. The question of whether it's permissible to seek a third-party recovery from TRICARE beneficiaries in excess of the TRICARE approved amount is central to every single claim of this potential class and will essentially resolve those claims on the liability issues. The Walmart court said the capacity of a class wide proceeding to generate common answers apt to drive the resolution of the litigation is really what we are looking at. Not the rating of common questions, but whether or not the answers to those question will resolve the case as to all class members.

And, again, the resolution of the identified legal issue, based on the facts which are undisputed, will resolve it. That is why this case, Your Honor, is particularly appropriate for class certification. In the Chipman case the Montana Supreme Court went on to note that what was at issue was a uniform employment practice and a standardized group contract. So, again, like the present case where there is a policy, a contract or a practice which affects everyone equally, as opposed to amorphous and disparate discretion among various company employees like the court addressed in Walmart, then commonality is met.

In fact, where our Supreme Court said, "Unlike Walmart where individuals in a class were treated differently and local personnel had wide discretion, employers operated

under a company-wide policy that applied equally to all members of this class." Again, that's the Montana Supreme Court in Chipman. Again, it's not binding on this Court, but it's notable and persuasive in this case where we have some Montana questions of law, where the Montana Supreme Court follows a Federal analysis, and where there are issues where Montana law and Federal law are both implicated in this case, such as the made whole doctrine.

Another area that I think is worthy of some brief remarks today, and that is as to the adequacy of our client as a class representative. They have raised one argument that he's not adequate, and that's essentially based on the argument that he committed fraud by not identifying, when he went back in May, that there was a third-party insurer in this case. The problem with -- well, there is a couple of problems with that, and they are set forth in the brief, but the most important problem is that is not factually supported.

The only specific sworn testimony in front of this Court is the affidavit of my client in which he indicates that, A, he didn't provide the information; and, B, what happened when he went back in May was simply they were asked do you have the same insurance, and he said yes. There has been no countervailing affidavit filed from the person who did the intake. Most likely that person has long since forgotten it. There is no real basis other than speculation to find that he

did anything or his wife did anything other than what was testified to in their earlier affidavits.

Based on that, this unclean hands defense isn't really a defense. It's really not worthy of consideration. But as I pointed out, Your Honor, in the brief, even if it had any legs whatsoever, it still wouldn't as a legal matter. Because if what Benefis was doing was wrong, it was wrong. If their interpretation of the Federal statutes is wrong, that doesn't make him have unclean hands, it just returns the situation to where it should have been in the first place. Or at least it would have but for the fact that they then went and filed liens and tried to recover the full amount of the May treatment from the tortfeasor's insurer anyway.

The final issue, Your Honor, that I want to talk about briefly is the interaction of this class with the Conway class. As this Court knows, there is another case pending in State court, I believe it's still on appeal waiting decision for the Montana Supreme Court case. That case was briefly in front of this case and was remanded to State court, and it's undisputed that the class which we are seeking here would constitute a sub class in that action.

In that action, the plaintiff, Conway, has requested and received at the State District Court level a class certification that is very broad and addresses the same issue that we are addressing except that it includes every single

case where any kind of insurer has a contract under which -- under which contract Benefis agrees to accept less than its full amount, but then seeks its full amount from other sources.

As I pointed out, though, that's --

THE COURT: Well, does that, Counsel, if it carries through to completion and favorably to the class position, preempt your case?

MR. LANNING: No, it does not, Your Honor. And there I would refer the Court to the Ninth Circuit cases that are discussed in our brief in which the Ninth Circuit addresses under what circumstances can there be overlap in classes? Because we've definitely got an overlap in class to the extent that our class is an entire subset. However, one of those circumstances involves the difference of the remedies of the causes of action of the violations claim. And that -- that's the Negrete case and its related cases, and that is the primary case and rationale upon which we base our beliefs that the classes -- that class actions can be done separately.

Conway and his counsel have pursued strictly state law remedies based primarily on breach of contract between the healthcare provider and the insurance provider, or TRICARE, whereas we are -- we have a broader and different scope. In our case we are arguing violations or the application of Federal law that is specific to TRICARE, specific statutory and regulatory provisions. We also are seeking

injunctive relief, whereas they are seeking monetary relief. Depending on the scope of the class and the scope of the relief, you know, the injunctive relief we seek could result in the hospital having to go back and make some adjustments. Or it could limit the hospital as to outstanding claims and claims going forward. It depends on how wide of relief ultimately is granted. But that does not need to serve as an impediment to class certification, Your Honor.

We are entitled to, we believe, injunctive relief that is class wide, attorney's fees. We also have as a sub class arguments based on wrongful lien. These -- all of these matters, all of these issues differentiate us enough from the Conway action that we believe that, under the rules set forth in the Allianz and Negrete case as cited in my brief, that we are allowed to proceed, as well.

The Ninth Circuit, in considering the issue, said that the district court would have to live with the vicissitudes and consequences of our elegantly messy Federal system. (Shrugs shoulders) We agree. We think that the issues decided -- or to be decided in this case are of sufficient importance to the class and to all of the parties, that these Federal law questions are disserving of certification and should be resolved by this Court rather than ignored in the other action. And there is, of course, still a possibility of -- for an opt-out in the other action depending on how it plays out, that

hasn't been fully foreclosed procedurally, as well. We don't think it's necessary. We think the issues are sufficiently different that the overlap, such as it is, does not mean that only one of these actions can be pursued.

Having made those specific points, Your Honor, I guess I would now give the podium to Benefis' counsel so that they can address the deficiencies they believe we have.

THE COURT: All right. I may have some questions of Counsel, but let's hear from the Defense first.

MR. LANNING: Okay.

THE COURT: Counsel, you have the floor.

MR. MCLEAN: Thank you, Judge.

Your Honor, for the record, David McClean here representing Benefis Health System. Judge, I, like Mr. Lanning, think that the issue has been fairly well briefed. And I don't want to repeat what's contained in the brief, but I think where I -- I need to start and point out is when Mr. Lanning stood up and commenced his argument, he used the word "appears" many times. "It appears." "It appears." And the facts of the matter is that he had the burden of proof in this case, and "appears" does not equate to the evidence.

And the only -- what they want you to believe is evidence that they presented is they take some data that was comprised in a spreadsheet, and they also argue in their brief that it appears, based on the number of claims, that there

may be up to 1,000 -- 1,366, I think was the number, of potential claimants in this particular cause of action, but, again, there hasn't been evidence actually submitted. And I submit to you it's because it doesn't exist, that this is a systematic-wide practice.

Now, you've heard all this discussion about TRICARE and how it is they are billed, but the one thing that the briefs are clear on and the Federal regulations are clear on, and the TRICARE contract is clear on and the TRICARE manual is clear on, is that TRICARE is to be a secondary pay, and that it is true Benefis accepts reduced payments from TRICARE for covered services. But I would, again, submit that when we are analyzing covered services, the Plaintiff also would carry the burden to prove that what occurred in this case would meet the definition under covered services; and if it doesn't, then there wouldn't be any interplay anyway.

But one of the things that the TRICARE contract talks about is not only that you look at the regulations, the rules and the policies, but one of the things that it says that the provider like Benefis should do is confer with the TMA or TRICARE Management Activity, and in this case you have an affidavit in front of you that Benefis was, in fact, conferring with the TMA through its counsel at the JAG.

When you look at the TRICARE manual, which we did attach as Exhibit 1, Section 5.5.2, which Plaintiff also cites

in Page 3 of their brief, you see that the TRICARE contemplates bills for services against liable third party insurers. In this particular case where there is a dispute -- and, again, I think an affidavit from Sue Atkinson at Benefis that was attached to our brief outlines the interplay and the conversation she had and what she discovered in terms of whether there were misrepresentations or concealment of the potential third-party payer, Unitrin, in this particular case.

So I think when you consider that affidavit, it shows that, at least according to TRICARE, they were informing Mr. Van Orden of how this whole system worked. But in essence, Benefis' position is he concealed that third-party payer. The problem with that is when it's discovered, given the TRICARE regulations that it is the payer of last resort or always to be secondary when there is a third-party carrier, you have to go back and unring that bell. Because you have to file that TRICARE claim within a year. And when they are getting close to that year period, you file the claim only to discover it shouldn't have been filed, or at least when it was filed TRICARE should have been notified of the third-party payer. The problem is the Plaintiff concealed that, and hence they shouldn't benefit, which is the essence of the unclean hands argument.

The TRICARE institution contract that's attached as Exhibit 2 to Benefis' brief in opposition to class certification,

under Part 6 there is general provisions, which is on Page 12 of 37, and under Paragraph G it includes a provision that not only states that TRICARE coverage is always secondary, but also provides if another entity is providing coverage, Benefis shall bill that entity first and then provide the information to TRICARE regarding -- or regarding that carrier, you provide that information of who actually that third party biller would be to TriWest when submitting the claim.

The other issue we raised is that we don't believe that the Plaintiff has standing in essence because they are not an attended third-party beneficiary of this contract and that they are more in line of being an incidental beneficiary to this particular contract between TRICARE and Benefis Health System.

Then when you start turning to the factors of class action, and you start looking at a potential definition of the punitive class, we think that the Plaintiff's identifiable class is not susceptible to a precise definition, because it's difficult to ascertain whether they are talking about claims where liens were never filed, because there are certainly going to be TRICARE claims where there is liens that were never filed, there is also going to be a question of when was the lien filed. Was it submitted prior -- a lien filed prior to submission of the claim to TRICARE, or was it submitted after?

In addition, there is also a whole made whole

component that at some point will come into play. You know, Plaintiff has asserted, for example, a conversion claim. And as we all know, conversion would mean taking something that belongs to another and converting it to your own. But if a Plaintiff in this claim never exhausted policy limits, they would have never recovered anything more anyway. And so they would not, in and of themselves as individuals, be part of the conversion plan.

With regard to Rule 23(a) and the numerosity, again, we think that, although the Plaintiff carries the burden of proof on that, that the class parameters are not definitive. I don't know what question provides the common answer. The Plaintiff has addressed lien filings by Benefis, and refers to those liens, but, again, based on what I've talked to you about in terms of the requirement to bill third parties first, et cetera, are we talking about when liens were filed before TRICARE was billed, after they were billed, or what about cases where no such liens were ever filed?

With regard to commonality, I think the Walmart v. Dukes case at Page 2551 succinctly sets out what we should be talking about, which is did the individuals in the class suffer the same injury. And, again, I turn to you and say no, because we are still going to engage in an analysis, for example, if a policy was never exhausted a person would have been made whole because they didn't exhaust that policy, and

there is no further damages. If, however, a policy may have been exhausted, there is at least the analysis as to whether or not you then determine is there more to do to make that person whole.

Plaintiff was just talking to you a little bit about the Conway case. And just so the Court is clear, Conway is one of, I believe, eight class action lawsuits against hospitals in this state right now. And the Conway case is up on appeal. It's not even fully briefed before the Montana Supreme Court as of yet. We obviously, and I strongly think that there were errors in that particular case, hence the reason it's up on appeal now.

There have been two of the class action lawsuits filed by the Blewetts that also have been dismissed by district courts, one by Judge Todd and one by Judge Fagg, both of those are captioned the Harris cases. One is Harris versus Billings Clinic and one is Harris versus St. Vincent's. And so there is not this uniform application of class actions in this particular, I guess, array with regard to preferred provider agreements.

Now, you asked a question about whether or not resolution of the Conway case may consume Mr. Lanning, and my response to that is I think it's premature. I do think the Court should know that Mr. Lanning attempted to intervene in the Conway case, and Judge Neill didn't allow that, and

recognize that the claims here are also included in that particular class.

When we talk about typicality, I think, again, there is this dispute in front of you based on the affidavit from Benefis that I think the Plaintiff's experience in this particular case is unique. There is a question, at least, and we believe that the evidence actually shows, that the Plaintiff was not as forthright as he should have been about third-party coverage.

There is two events where this conduct and credibility was identified, the first was when the Plaintiff was treated in May and he indicated that he did not have coverage for an automobile -- care for the treatment he received, which was later to be discovered untrue, and then again in August of 2010 Plaintiff indicated he wanted TRICARE billed as he had not yet filed a claim with Unitrin. And that was when the JAGs office -- and this is where Sue Atkinson had those communications outlined that there was, in fact, a Unitrin claim. They gave Benefis the instructions to go after that Unitrin claim, and then TRICARE requested a refund of the monies they had paid based upon the discovery.

One of the things that the Plaintiff argues in their brief on Page 12 is they say that, while Benefis pursued the same goal of maximizing payment from a third-party insurer by TRICARE beneficiaries in several ways, not billing TRICARE at all in some cases, billing TRICARE first in other cases, and

returning TRICARE's payment if more money was recovered from a third-party insurance source, and filing liens in some cases but not others, now that's their quote, and I think what I use that quote to show is that, in fact, there are unique defenses to the various claims, which, in our opinion, destroys the typicality.

Furthermore, given the unique defenses to this particular individual, Mr. Van Orden, and the misrepresentations, you know, we cited the Foxmeyer case, that we believe is on point, that Mr. Van Orden is not -- his claims are not typical because he's subsumed with defending credibly and misrepresentation, which also plays into the adequacy of representation, which is the fourth element.

Now, I don't think we've taken exception with Mr. Lanning or his firm, but it's not just about the law firm and their capable representation, it is also about the class representative. But as I've already alluded to, I think the class representative's attention in this case is going to be diverted.

Similarly, the Plaintiff stated on Page 23 of his opening brief that, "The focal question was whether Benefis is entitled to seek and receive payment for its treatment of TRICARE beneficiaries from third-party liability and UM/UIM insurance sources in excess of the established TRICARE reimbursement rate." What's interesting about that is they

are talking about payment being received, Judge, and in this case there has been no payment received. So I guess Mr. Van Orden doesn't fit within the focal question that Plaintiff in and of themselves has, in fact, presented.

When you look at, then, turning to the 23(b)(2) issues, I think what I'd just say with regard to 23(b)(2) is the Walmart decision talked about -- it talked about 23(b)(2) in length, and it stated that the rule does not authorize class certification when each class member would be entitled to an individualized award of money damages, which we believe has occurred or would occur in this particular case. When you look at the Plaintiff's claims, they say that their dec action is in essence the flagship claim, to quote them, they then have a breach of contract claim, a conversion claim, a wrongful lien claim and a tortious interference claim. And obviously four of the five claims focus on monetary recovery.

But I also think each of those claims presents its own unique set of circumstances. The dec action, again, they are saying it appears there's been a systematic action, which we, of course, disagree with and submit that they haven't met the burden because there is no evidence of that, but, again, wouldn't it depend on the timing? If the regulations from TRICARE allow, and, in fact, direct and instruct that TRICARE is to be the secondary payer, wouldn't the dec action only apply if, in fact, there was a violation of that specifically?

Which here I think what they are saying is, well, you found out too late. I don't think you can apply it with a broad brush.

Similarly, with the breach of contract, again, it's individualistic, because the regulations manual and contract talk about pursuit of recovery from these third parties. And so it would depend, I guess, you would have to have a wrongful recovery in order to have a contractual breach, which we submit they are not even a party to.

Similarly, you have the same issues with conversion, wrongful lien, tortious interference. There is cases where even the quote I read to you earlier from their brief where they say where liens were not even filed, again, it's going to hinge on the timing of when the third parties were not billed, what was disclosed by each individual plaintiff, including was there a concealment or lack thereof with regard to a third party, was a Plaintiff made whole or not made whole that would have exhausted? Because the bottom line is if there is no exhaustion of a policy, then the Plaintiff has suffered no damages anyway. And so, you know, it's our position that there is not a claim that uniformly applies to all.

I think that same quote that I had read from the Plaintiff also destroys the predominance under 23(b)(2). There's going to be multiple mini trials regarding what would the damages be for each particularly -- each individual. And I think that, again, you get into analyzing when payment was

sought for each claim, whether a lien was or was not filed, whether a party was or was not made whole, what representative each potential class member did or did not make when the information was provided to Benefis upon seeking treatment.

Judge, I guess, you know, I'm willing to answer any questions, but I think here the Plaintiff's failed to carry the burden of proof. I think that they talk in their brief about speculation and supposition and conclusory allegations that shouldn't be made by Benefis, but I think that's what their brief actually contains, and, as such, I think that Plaintiff's failed to meet the Rule 23 requirements and class certification should be denied.

THE COURT: Mr. Lanning, you want to respond?

MR. LANNING: Briefly, Your Honor.

Addressing some of Mr. McClean's introductory remarks I would simply point out, Your Honor, that the question is not whether the hospital was acting in good faith or bad faith, but whether its compliance -- whether its policy complied with Federal law. I mean, that is the question, regardless of whether what their contract said or what they were told by the regional administrator. The question is were they acting in compliance with Federal law in pursuing this policy or were they not? I'm certainly sympathetic to the fact that they believed they were relying on a contract, but to the

extent that contract violates Federal law, it provides them no defense.

Mr. McClean made the point or the argument that we have failed to provide sufficient evidence of a systematic policy. Your Honor, like I said earlier, the evidence is in the affidavit and brief of Benefis. The affidavit of Sue Atkinson and their very brief admit that this is how they did it. Not in this case, but in every case. And with respect to the issue of the circumstance where they find out later that there is a third-party source, that happened, that's not unique to this case.

In fact, what they said in their brief was, "Patients treated at Benefis are asked to identify the appropriate payer for their medical care to ensure that the appropriate entity is billed." That's on Page 10. They will bill who they think is appropriate. And when there is third-party insurance, they have indicated that's who they think is appropriate regardless of whether or not TRICARE applies.

Then further on down that second paragraph, they say, "Benefis frequently learned of third-party payers after billing TRICARE. Benefis then usually bills the third-party payer and reimburses TRICARE any amount TRICARE has paid." What happened to my client was not unique, it was systematic. "Frequently" and "usually" are their own words to describe how often the circumstance comes up.

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What is unique about my client, Your Honor, is that because he had two different claims, and they were handled in two different ways, he actually straddles the practical or factual divide in terms of potential subclasses, those who never had a chance to have TRICARE billed because Benefis moved straight to the insurer -- third-party insurer, and those who TRICARE billed, paid, and then they had to give it back.

They briefly addressed numerosity. In response to discovery, they provided a disk with 62,245 TRICARE patient account payment records. And they also indicated in discovery that that was not complete, that they could not identify, as TRICARE patients those where TRICARE was never billed. We also know it's incomplete for another reason, that's my client is not included in it for some reason. Don't know why.

So, yeah, we analyzed all 62,245 patients, we came up with 39 claims that appear to be certain, another 1,366 which are probable. Those reflect only those circumstances where TRICARE was billed and then later money was paid back to TRICARE. And, again, that's not complete. As the case law makes clear, Your Honor, an exact number is not necessary to satisfy numerosity. It just has to be sufficient to show that it's impractical. Doesn't -- it can be estimated.

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Based upon the information that we were provided, our estimate is sufficient to show that these -- it is not appropriate for these cases to be handled one-on-one, that there are sufficient numbers of them regardless of Benefis' own inadequate -- or record keeping to identify some of them to proceed as a class. And as far as I know, Benefis doesn't contest -- isn't saying that they provided us with incorrect information.

Benefis takes issue at the fact that we have identified different ways in which individual class members might be hurt by their application of the policy. The fact that people may be hurt, deprived of money or deprived of insurance proceeds for a period of time while wrongful lien is in effect, in different ways should not and does not serve as an impediment to class certification, Your Honor. The simple overriding legal question as to whether or not this policy, whether executed at the outset or belatedly, violates Federal law is sufficient for commonality, is sufficient for typicality.

The injunctive relief that we have sought clearly falls under Rule 23(b)(2), and, as stated in the brief, we also meet the 23(b)(3) requirements. There aren't a lot of cases close enough to this one to provide overreaching Federal authority on the scope of the injunctive relief. That, Your Honor, is why we've cited to the Safeco versus Ferguson case, to the Montana Supreme Court cases where they fully reject

the argument that is being made by Benefis in this case.

Injunctive relief that may require Benefis to go back and act appropriately under the law, just like Safeco was required to go back and act appropriately under the law in terms of the made whole doctrine, does not require this Court to have any a number of many trials. It may require Benefis to resolve the matter internally, but that does not mean that the injunctive relief somehow becomes something other than injunctive relief or requires this Court to have hundreds of separate legal proceedings. It can be up to Benefis to fix its improprieties injunctively without requiring this Court to make specific factual findings.

Unless the Court has any specific questions.

THE COURT: Well, I'll start with the question, do -- does the Plaintiff take issue with the proposition as advanced by Benefis that TRICARE is a secondary payer? That is, that it doesn't pay until other sources of payment either can't or won't pay?

MR. LANNING: Your Honor, we do not take issue with that in that that is a correct statement of Federal statutory and regulatory law. We do take issue, however, with how Benefis would apply it in this case.

THE COURT: I understand that part of it. But -- well, let's assume that whether Benefis does or does not comply, if your client's bill gets paid -- now, I'm talking about

Van Orden, I'm not talking about class members.

MR. LANNING: Yes.

THE COURT: If Van Orden's bill gets paid, satisfied, what's it damage? If he doesn't have to come up with money out of his pocket to pay the Benefis bill, what's his damage? What's his standing to contest the --

MR. LANNING: Well, his specific --

THE COURT: -- event?

MR. LANNING: His specific damages now are primarily interest damages in that there were delays in him receiving policy benefits that he would otherwise have received but for the actions of Benefis in seeking to --

THE COURT: Now, what do you mean by that, Counsel? Help me there, please.

MR. LANNING: Okay. There were insufficient -- well, let me back up and give you a little more facts, Your Honor. The tortfeasor had a minimum limits policy of which 25,000 was available for my client. He had, under his own policy, 50,000 in uninsured and under insured benefits.

THE COURT: Okay.

MR. LANNING: Which covered here --

THE COURT: Now we are implicating other characters. All right.

MR. LANNING: Right.

THE COURT: Now that you mentioned that in

some instances the people who you assert to be involved in this class might have Med Pay coverages that could be implicated, as well.

MR. LANNING: Actually, no, we have kept Med -- we've cut Med Pay out.

THE COURT: Well, I heard you mention that in argument, that Med Pay was a potential third source from which money might come.

MR. LANNING: Yes. But it's not a source that is included in our class, because our class is concerned with the made whole doctrine of both --

THE COURT: All right. Okay.

MR. LANNING: -- State and Federal law.

THE COURT: At bottom you're looking at the made whole doctrine as a component of the process.

MR. LANNING: That is correct, Your Honor.

THE COURT: All right.

MR. LANNING: And in this case --

THE COURT: I don't know that you said that, but I certainly drew that conclusion.

MR. LANNING: Right. And that's why we are not seeking to include those benefits in.

THE COURT: Well, is your case, then -- your case, Van Orden's case, dependant upon the fact that he was not made whole as that doctrine would be interpreted without

resorting to these other funds, or indeed without resorting to the money that went to Benefis?

MR. LANNING: Uhm, mostly. With respect to the wrongful lien, uhm, no, there are additional remedies there. But, yes. In large part, Your Honor, yes.

THE COURT: Okay. All right. Well, what do we know, if anything, about whether these other people who are out there that you seek to involve as members of the class have such made whole doctrine claims?

MR. LANNING: We have no specific knowledge on the extent of their potential insurance recovery at this time.

THE COURT: All right. Okay. All right.

MR. LANNING: That would be part of our class process in identifying and communicating with them.

THE COURT: Okay. All right. I understand.

MR. LANNING: Okay.

THE COURT: Well, I think that's the questions that I had at this point. All right. Go ahead, Counsel, do you have anything else you want to present?

MR. LANNING: No, Your Honor.

THE COURT: Or either side does?

MR. LANNING: Nope. I think that's all.

THE COURT: Well, then, let's see if we can address these matters. I'll start in making the observation that what this Court will do, or indeed what it can do under

the limited jurisdiction that it has, is limit itself to this case. I do not intend to make any ruling, consider myself not to have the capacity at this point to make any rulings, that would be implicated by as yet unresolved other cases pending either in State District Court or in the Montana Supreme Court. The Conway case, was that the name of the case?

MR. MCLEAN: Yes, Your Honor.

THE COURT: Counsel can be assured that nothing has happened or that is happening or ongoing or unresolved in the Conway case will get any weight in this court because I don't think its appropriate to engage in that sort of speculation. And I certainly don't think it appropriate that we, in effect, defer rulings here to the weight action in some other court in the Conway case.

Counsel had referenced on both sides the Walmart decision from the United States Supreme Court, 2011, as a significant guideline provider for purposes of class action litigation, and we will certainly be guided by the principles set forth in that case as they may apply here. As an observation, Counsel, it appears to this Court that the Walmart decision is in the same vein, although not factually the same, as the cases that are commonly referred to as Iqbal and Twombly, which are two decisions from the United States Supreme Court in 2007 and 2008, as I recall, which I think are now well accepted as having in effect created a new set of criteria by

which pleadings in Federal Court are to be evaluated.

Where is the commonality between the two, just as a short observation before we get into the particulars of the Walmart case? Iqbal and Twombly both made clear, at least read together, that simple notice of pleading, some sort of assertion of a factual basis for, or a factual end conclusional basis for a claim is not enough, that the pleader, under an appropriate interpretation of Rule 8, is obliged to be specific in pleadings in certain areas to the point that the court can make a reasoned determination as to whether there is a claim presented. And a part of the analysis that is set out in those cases is that it is the obligation of the court to apply what is I think referred to as its judicial experience in making that analysis.

We find, in the view of this Court, a sort of parallel, in fact, a very real parallel, in the way that the Supreme Court addresses the compliance with -- necessary to meet the obligations of Rule 23. So let's start with Rule 23, and I'll touch upon that comparison more specifically. Rule 23, of course, requires that there been a compliance with both Rules 23(a) and (b). Now, they are stated in different fashions. All of the provisions of Rule 23(a) must be met, those are to be met conjunctively, and at least one of the requirements of Rule 23(b) is to be met. That analysis and conclusion from the analysis is clear, not only from the plain

language of the rule itself, but is similarly stated in the Walmart decision.

Now, what did Rule 23(a) require? We'll start there. Well, it requires four criteria to be met. One, that the class is so numerous that joinder of all members is impractical. Second, that there are questions of law or fact common to the class. Third, that the claims -- or defenses of the representative parties are typical of the claims or defenses of the class. And, four, that the representative parties will fairly and adequately protect the interests of the class. No dispute that all of those are to be met, and there is no dispute at this point but that the burden is on the party that is proposing the class to establish that those criteria are met.

The WalMart case, however, gives us some additional insight into what is required to meet those conditions, one of those is that the Supreme Court has now set forth clearly that the trial court has an obligation to engage in what is characterized as a rigorous analysis to ensure that compliance with the requirements of the rule are met. That, in the view of this Court, is a parallel to the increased pleading standard requirements that were first annunciated in Iqbal and Twombly. To state it a bit differently, it appears to this Court that the rigorous analysis choice of words in the Walmart case is a difference in language, but not a difference in content from the obligations

imposed upon the district court in Iqbal and Twombly in reviewing the sufficiency of a claim under Rule 12(b)(6).

Another component of what Walmart tells us is that the Plaintiff must, to use the language of the opinion, affirmatively just demonstrate compliance with the requirements of Rule 23(a). And the final observation that the Court makes is that actual conformance with the rule is, and I quote, "indispensable." That is indeed, by any dispassionate analysis, quite different from picking up a pleading and casually looking at it and determining that, well, there appears to be something in the nature of facial compliance with the requirements of the rule as set forth, and that's good enough. Those days, it appears to this Court, are gone, at least in this type of litigation involving class actions.

So, that leads us, then, to an analysis of whether those standards are met by what is now before the Court. Another component of Iqbal and Twombly that I think has application here is that discovery is not the tool to be resorted to to determine whether or not the requirements of setting forth an appropriate claim under the rules have been met. Now, specifically the provision that was under consideration in Iqbal and Twombly was the Rule 12 motion. Here we are looking at a Rule 23 issue, but the parallels are striking. This Walmart -- in the Walmart case, the conformance with the rule being characterized as indispensable is a clear signal in

itself.

So, let's look first at taking these up in the order in which they appear. Whether the class is so numerous that joinder of all members is impractical. Well, the case law tells us otherwise, that this is not a hard and fast rule to be determined by some specific number. It is, in any instance, a case-by-case analysis process, there is not any hard and fast rule to be applied. Some examples that we have determined in our research have led us to conclude that a range of the sort that is talked about here, in 30-some-odd that the Plaintiff believes are specific, that a range of that might be appropriate or might not be. Some cases, 15 to 40 class member range say, yes, the number set forth is enough, others say no, but the bottom line is that it's an individual case-by-case analysis. And it is a burden to be carried by the plaintiff.

Now, what do we have here? Well, what we have, in the view of the Court, is that we have a substantial number of assertions that appear in the briefs, and to some extent repeated here in argument, of all -- what the potential number of persons who with claims that might fit into this class are, but we don't have any actual numbers. You know, we have some reference made to what I think Plaintiffs have characterized as "our estimate," but we do not have in the form of proof, through affidavit or otherwise, of any specific

number. So we have that much, and we don't have more.

Turning to the separate and second component, which is called -- in shorthand is the commonality component, that has found more specificity in case law, particularly in the Walmart decision, which requires that there be, as have been some reference here today, a showing that the class members suffered the same injury. And we have other language from the Walmart case that the common contentions must be of such a nature that it is capable of class-wide resolution, which means that the determination of the -- what amounts to a single issue, truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Now, one can read that to have some amount of weight, but I read it to say what the language on the page says, which is that there must be specificity. Now, here the Plaintiff asserts that the question is whether Benefis is entitled to receive and received payments from its treatment of TRICARE beneficiaries from third-party liability and UM/UIM insurance sources in excess of the established TRICARE reimbursement rate.

Now, that issue, as it's framed, and as the colloquy with Counsel certainly confirmed, includes at least two classes of other insurance beyond the TRICARE insurance, if what TRICARE provides is generically classified as insurance, that particularly other insurance that may have been provided by a

third party, that is a third party liability carrier, or by a carrier who provided coverage to the Plaintiff insured under under-insured or uninsured coverages. And as Counsel has acknowledged, Med Pay may also be involved, although Counsel is clear in making his position that, no, that they are not -- they, the Plaintiffs in this class group, are not including Med Pay coverages.

But as the argument has progressed, and as the questions now I think confirm, what we are really talking about here in many components -- many of its components is whether the Plaintiff here has a claim in the first instance under the made whole doctrine. And I take it to be the Plaintiff's position that, well, maybe he does, but, in any event, he's not able to say, and I think it is appropriate, the candor having been expressed, that where there was other people who are sought to be within the class have this made whole concept applicable to them or whether they do not. So we have that sort of left hand.

When we turn to the typicality component, the third component of this quartet requirement, the claims of the Plaintiff have to be typical of all the class members. And the court has -- at least the Supreme Court in the Walmart case has made it clear that this particular requirement may, in fact, overlap with the adequacy of representation component, and that's, I think, reality as to perhaps more than just the latter

two of these four requirements, that there may be some overlap of satisfaction or lack of satisfaction of the core requirements throughout the analysis process and there may be overlap.

But the Plaintiff in here asserts that all of the potential class member Plaintiffs have claims that arise from the same practice or course of conduct as that was -- as that engaged in with this Plaintiff. And Mr. Lanning, of course, points out that he sees his named plaintiff as in such straddling a -- at least a part of these processes that are said to have been engaged in by Benefis. Which are characterized in the papers, and I think here in argument, as one of those processes that is complained about, is that TRICARE wasn't billed at all, and that's thought to be inappropriate.

Another is that TRICARE was billed first, and then if TRICARE paid, billed first and paid first, then the practice of Benefis is to return money received from some other source, some third party source, if such a third party source payment was received at a later time. That is whatever TRICARE had paid would be reimbursed to TRICARE.

And then the third practice that is said to have been inappropriate was the filing of liens in some cases but not others, with some result apparently coming from both lien filings, whether they were ultimately paid or dropped or what. But I conclude from this record that what we have is not a

practice that is being focused upon in particular, but a combination of practices, some of which, as the named Plaintiff may say applies to him, others may not, and there are other potential class members who may have one or more of these practices which are said to be inappropriate applicable to them, either individually or perhaps in some other combination.

Interwoven throughout this is the assertion made by the Defendant, as it relates to Van Orden, is that there are un -- or said to be unresolved factual disputes, and resolution of those factual disputes is literally at the heart and soul of whether the Plaintiff in the first instance has individually a viable claim, that is the assertion is what really happened and who is to be believed in this process, who in large aren't resolved, can't be resolved at this juncture in this case, and that frankly and directly leads us, in view of the Court, right into the fourth component of this analysis process, which is adequacy of representation.

And if I get any message at all, Counsel, from the Walmart case, it is to this Court clear that if the Court is to put its stamp of endorsement on selection of a class representative, that that class representative must be capable of fairly and adequately representing the interests of the class, and that this component is subject to the same rigorous analysis requirement, and that compliance with this particular

component is indispensable to a determination that the class should be certified as requested.

And my assessment of this one is that the Plaintiff simply has too many unique issues which are not shown by anything before this Court as relating to any other potential class member that preclude this Plaintiff from being freed up from a preoccupation, or even a dominance in this set of circumstances, with his particular role in proving his own claim, and I find that that mitigates against this Court finding, under the rigorous analysis standard that I deem myself obliged to apply, that the typicality of his claims and the adequacy of representation requirements for certification under Rule 23(a) have been met. I find they have not been met. If we were looking solely at what is asserted on the face of the pleading, and at an earlier time pre-Walmart this pleading might have passed mustard, but I don't think it does so under the requirements of the Walmart case.

Now, we have in addition here the question of whether we -- in my earlier comments what I left unresolved as to whether a joinder of all these people is impractical. While I don't think it's determinative of the issue before the Court, if we were looking solely at this issue, while we have assertions and briefs and arguments made, I don't find that the rigorous analysis test component has been passed with regard to the number of persons being so large that their

joinder would be impractical. And certainly with regard to these questions of coverages that might be implicated and the whole of the made whole concept, it seems to me what we are being asked to do is approve a class that would simply dump all of those types of claims into a common resolution format, and that's not, in view of this Court, what a class action is supposed to do.

We can't find and search out a particular question, say, well, resolve that question and then we'll leave all the rest of these questions to be resolved individually. That's not what a class action is intended to do in view of this Court, and I think that is exactly what we would be walking into were we to undertake that task here. And, therefore, my conclusion is that the motion for certification of class must be, as framed, denied.

That's the ruling of the Court. There will be a short summary ruling, Counsel, that will place upon the record the substance of the ruling. If you want the detail of the why, you need to go to the transcript. I emphasize, Counsel, that if this matter were presented pre Walmart we might be looking at a totally different standard, but I think where we are today is where we are. And this Court, like other Federal District Courts across this country, are obliged in all candor to rethink long-honored practices of pleading and to recognize that the Supreme Court has given us what amounts to new marching

orders for how we are to approach many pleading issues that come before us.

I appreciate the good work on all sides by Counsel, and we will look forward to continuing with the case in the individual plaintiff component. We are in recess.

(Proceedings concluded at 11:26 a.m.)

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CERTIFICATE

STATE OF MONTANA }
} ss:
COUNTY OF BUTTE-SILVER BOW }

I, Julie L. Sampson, Official Court Reporter for the U.S. District Court, and notary public in and for the aforesaid county and state, do hereby certify that:

I am a duly-appointed, qualified Court Reporter; that all of the proceedings had in the above-entitled action were taken down by me in shorthand and thereafter reduced to computerized transcription, and the foregoing transcript contains a full, true, and correct transcript of the said proceedings to the best of my ability.

IN WITNESS WHEREOF, I have hereunto set my hand this 20th day of November, 2012.

/s/ Julie Sampson
Julie L. Sampson
Court Reporter

(SEAL)

/s/ Julie Sampson
Julie L. Sampson
Notary Public for the State of Montana
Residing at Butte, Montana
My Commission Expires January 20, 2015

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